



Decision

Matter of: Wind Gap Knitwear, Inc.

File: B-261045

Date: June 20, 1995

Andrew B. Katz, Esq., Jonathan P. Morgan, Esq., and Dennis J. Riley, Esq., Riley & Artabane, for the protester. Robert Carter, Esq., and James H. Henry II, Esq., Henry, McCord & Bean, for Daun-Ray Casuals, Inc., an interested party.

Gale Furman, Esq., and Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.

Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation provides for evaluation of past performance on the basis of production information concerning only the 2 years preceding the closing date for receipt of proposals, agency properly elected not to consider awardee's past performance outside this 2-year period.

DECISION

Wind Gap Knitwear, Inc. protests the award of a contract to Daun-Ray Casuals, Inc., under request for proposals (RFP) No. SP01000-95-R-0018, issued by the Defense Logistics Agency for certain extended cold weather clothing system (ECWS) undershirts. Wind Gap contends that the agency failed to properly evaluate Daun-Ray's past performance.

We deny the protest.

The RFP, issued as a total small business set-aside, contemplated award of a fixed-price, indefinite quantity contract for ECWS undershirts for a base year with a 1-year option. Offers were evaluated on the basis of price and two technical factors (in descending order of importance): product demonstration model (PDM) and experience/past performance. Technical quality was more important than price and award was to be made to the offeror whose proposal

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was most advantageous to the government. The more technically equal proposals were determined to be, the more important price would become in the evaluation.

With regard to past performance, the RFP required offerors to describe their experience producing the same or similar items within the last 2 years. The past performance evaluation served two purposes: evaluation of the offeror's credibility regarding its proposal representations and evaluation of the relative capability of the offerors. As to the latter purpose, the RFP advised that an offeror with an exceptional record of past performance may receive a more favorable evaluation than another whose record is acceptable, even though both may have otherwise equally acceptable proposals.

Proposals were rated using the following adjectives: highly acceptable, acceptable, marginally acceptable, and unacceptable. For the PDM, the absence of any deficiencies warranted a rating of highly acceptable, while easily correctable deficiencies warranted a rating of acceptable. To be rated highly acceptable under the past performance factor, the offeror's record had to demonstrate "exceptional" commitment to customer satisfaction and a "superior" overall record of timely delivery of high quality products. An offeror's record which demonstrated an "acceptable" commitment to customer satisfaction and an overall record of timely delivery of quality products, warranted an acceptable rating.

Seven offerors, including Wind Gap and Daun-Ray, submitted proposals by the January 18, 1995, closing date. Initially, the evaluators rated both the Wind Gap and Daun-Ray proposals as "acceptable" for the PDM and past performance. Noting that the evaluators found no PDM deficiencies for Wind Gap, Daun-Ray, and another offeror, the contracting officer revised these three PDM ratings to "highly acceptable." Based on these ratings and their "acceptable" past performance ratings, the contracting officer rated all three proposals as "highly acceptable." The contracting officer also determined that awarding a contract without discussions was in the government's best interest. The contracting officer considered all three proposals to be technically equivalent and recommended award to Daun-Ray as the offeror proposing the lowest price. The source selection authority agreed and awarded Daun-Ray the contract on March 28, where upon Wind Gap filed this protest.

Wind Gap contends that the agency's evaluation of Daun-Ray's past performance is flawed because the agency ignored various government contracts under which the awardee

allegedly had poor delivery performance. Wind Gap asserts that Daun-Ray's past performance assessment should have been downgraded to reflect these instances of poor performance.

The evaluation of technical proposals is primarily the responsibility of the contracting agency since the agency is responsible for defining its needs and the best method of accommodating them, and it must bear the burden of any difficulties resulting from a defective evaluation. Litton Sys., Inc., B-237596-3, Aug. 8, 1990, 90-2 CPD ¶ 115. It is not a function of our Office to reevaluate proposals; rather, we review the agency's evaluation of proposals only to ensure that it was fair, reasonable, and consistent with the evaluation criteria stated in the solicitation. VSE Corp., B-247610.2, Aug. 6, 1992, 92-2 CPD ¶ 81. Where a solicitation requires the evaluation of offerors' past performance, an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation requirements. Federal Envtl. Servs., Inc., B-250135.4, May 24, 1993, 93-1 CPD ¶ 398. From our review of the record, there is no basis to object to the agency's evaluation.

Here, the RFP required offerors to submit past performance data only for the preceding 2 years, and the record establishes that was the only period considered by the evaluators. Three of the Daun-Ray government contracts identified by Wind Gap in its protest were completed more than 2 years prior to the issuance of the solicitation. There was no requirement that the government assess Daun-Ray's performance under these contracts as it is proper for evaluators only to consider the record of past performance histories during the period stated in the RFP. Federal Envtl. Servs., Inc., supra. Two other Daun-Ray government contracts, which were within the 2-year period, were not considered by the evaluators because, at the time of the evaluation, no deliveries were due. While the protester claims that, at present, Daun-Ray was having performance difficulties on these contracts, in fact, the record establishes at present that Daun-Ray is ahead of schedule on deliveries for both contracts.

Wind Gap also contends that the evaluation was flawed because the evaluators improperly failed to investigate allegedly poor performance on two of Daun-Ray's commercial contracts. The protester bases this argument on the contracting officer's evaluation summary which noted that both commercial contractors had "cited some minor delinquencies." One delinquency concerned delays by a Daun-Ray supplier which were "quickly overcome" and the other concerned a "few minor delays of no significance." According to the summary, no quality problems were noted.

There is nothing unreasonable or improper in the agency's determination that these matters required no further investigation. The delays were not considered serious and were quickly resolved, indicating that Daun-Ray's past commercial performance was acceptable. In this regard, Daun-Ray has submitted statements from both commercial contractors indicating that both are completely satisfied with Daun-Ray's performance. Thus, even if the agency had conducted a further inquiry, it would have received only positive assessments from the appropriate contractors.

Wind Gap also claims that it should have received a higher past performance score than Daun-Ray because it had no reported deficiencies. In its view, when compared with Daun-Ray's record, Wind Gap's performance was "highly acceptable." This argument is without merit. In reviewing Wind Gap's commercial performance record, the agency found that the protester had "only insignificant delinquencies." The agency considers these delinquencies to be roughly equivalent to the minor commercial delinquencies that were also indicated for Daun-Ray. To be rated "highly acceptable," an offeror's past performance had to demonstrate an "exceptional" commitment to customer satisfaction and a "superior" overall record of timely delivery. In view of the commercial "delinquencies" for both offerors, the agency reasonably concluded that both proposals were simply "acceptable"; that is, both demonstrated an "acceptable" commitment to customer satisfaction and an overall record of timely delivery. While the protester maintains that the agency had no basis for concluding that Daun-Ray's proposal was technically equivalent to its own, it provides nothing which establishes the superiority of its proposal. Accordingly, its argument merely constitutes its disagreement with the agency, which does not itself render the evaluation unreasonable. Litton Sys., Inc., supra.

Finally, Wind Gap alleges that Daun-Ray lacks the financial responsibility to perform this contract.² A determination

¹One of Wind Gaps's commercial references states that the protester had good quality and delivery "with the exception of occasional minor problems which the firm effectively overcomes."

²Wind Gap also complained that the agency improperly failed to conduct discussions with it concerning its past performance. The agency report explained that the RFP did not require discussions on past performance and, since the RFP specifically provided for an award on the basis of initial proposals, the agency was not required to conduct

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that a bidder or offeror is capable of performing a contract is based, in large measure, on subjective judgments which generally are not susceptible to reasoned review. Thus, an agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied, neither of which is present here. 4 C.F.R. § 21.3(m)(5) (1995); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177.

The protest is denied.

\s\ Ronald Berger
for Robert P. Murphy
General Counsel

²(...continued)
discussions in any event. Wind Gap's comments did not rebut the agency's argument. Where, as here, an agency specifically addresses an issue raised by the protester in its initial protest and the protester fails to rebut the agency response in its comments, we consider the issue to have been abandoned by the protester and will not consider it. Analex Space Sys., Inc.; PAI Corp., B-259024; B-259024.2, Feb. 21, 1995, 95-1 CPD ¶ 106.